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No. 890

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

J. B. KING,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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No. .....

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J. B. KING,
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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner J. B. King prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above cause on October 7, 1968.

CITATION TO OPINION BELOW

The Supreme Court of Tennessee gave no opinion, but simply denied the petition for writ of certiorari of the petitioner to the Court of Criminal Appeals of Tennessee (R-33).

The opinion of the Court of Criminal Appeals of Tennessee is unreported, but appears in the Record at R-25-R-29.

Judgment of the Court of Criminal Appeals of Tennessee appears at R-31.

A certified copy of pertinent portions of the Record, containing the matters raised by this petition is filed simultaneously with this petition, and references to the Record will appear as "R- " which refers to the number that appears in the lower righthand corner of the pages of the Record.

JURISDICTION

Judgment of the Supreme Court of Tennessee was entered October 7, 1968 (R-33). Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

HOW FEDERAL QUESTION IS RAISED

Petitioner was indicted by the Knox County, Tennessee grand jury in a one-count indictment charging him with assault with intent to commit murder in the first degree with a deadly weapon, to-wit: a pistol, upon the person of one Glenn Rose, by shooting him. The shooting occurred November 14, 1964. Petitioner was arrested the same day on a warrant of the Municipal Court of the City of Knoxville, Tennessee, and was bound over to the Knox County grand jury by the Municipal Court within two or three days thereafter. Petitioner was not indicted until March 25, 1966, and was not tried until March 20, 1967, resulting in petitioner being convicted of assault with intent to commit murder in the second degree, and sentenced to one to five years imprisonment (R-8, R-11).

A civil suit was filed against petitioner by said Glenn Rose in the Circuit Court for Knox County, Tennessee, styled: *Glenn Rose* v. *J. B. King,* No. 25325, on May 10, 1965, for damages by reason of the shooting, in the amount of $50,000.00, which resulted in a civil judgment against petitioner herein in the amount of $2,000.00 which has been paid. Said civil case was tried on March 11, 1968.

Petitioner was denied his right to a speedy trial, as guaranteed him under the Sixth Amendment to the Constitution of the United States, by reason of the failure of the State of Tennessee to indict him from the date of his arrest on November 14, 1964 until March 25, 1966, when he was indicted.

When this case came on for trial, the petitioner immediately made motion that the indictment be dismissed for failure of the State to accord him his right to a speedy trial. The Trial Court made the following observation with respect to this motion to dismiss:

> "THE COURT: Well, the Court overrules the motion. At least I overrule it at this time, unless the proof would—after we hear the case—if there's matters that are brought out, I would change my opinion. That's a long time, in the Court's opinion, from the time when something happened until a man's indicted. As far as from the indictment forward, the Court doesn't find any basis at all to give any credence to the motion. Of course, he was indicted within the period of the statute of limitations for the offense. In the Court's opinion, this motion should be overruled at this stage anyway, but if something develops in the trial that I saw was different, I would change my mind. I don't believe the motion is timely and let the motion be overruled as stated by the defendant's counsel and exception duly noted."
>
> (R-22-R-23)

At least three or four grand juries had met and adjourned before petitioner was indicted (R-22).

Although the Trial Court stated that if it appeared in anywise during the trial that petitioner was prejudiced by the delay in bringing the indictment, then the motion to dismiss the indictment would be granted. It was very forcefully brought to the attention of the Trial Court during the trial that petitioner was prejudiced by the delay in bringing the indictment. It affirmatively appears in the record that at least two witnesses to the shooting had disappeared; that petitioner after indictment made every effort to locate them prior to trial, all to no avail. The record shows also that the delay in presenting the matter to the grand jury and bringing the indictment resulted in many witnesses' memories being vague and indefinite as to many of the important details. One of the most important details concerned a conversation between the alleged victim Rose and petitioner just prior to the shooting. None of the witnesses could remember the details of the conversation. Another vital detail in the case was whether petitioner's pistol had been fired more than once. Rose, who was shot, testified that petitioner shot three times. Petitioner testified he shot only one time. The pistol was taken from petitioner by the arresting officers, but it was never produced in the trial of the case, although petitioner called for its production. Petitioner testified that the pistol was fully loaded when he fired it one time and if produced it would show it was fired only once. The delay in bringing the indictment must have had something to do with the disappearance of the pistol. Rose's testimony that petitioner shot at him more than one time could have been considered by the jury as negating the plea of self-defense and the plea of defending another who was being assaulted by Rose with a billy-club at the time petitioner shot Rose.

No explanation was made by the State as to the disappearance of the pistol. No explanation was made by the State as to the reason for the delay in presenting the indictment.

It would appear that Rose was more interested in collecting damages in his civil suit against petitioner, which was filed within six months of the shooting, than in prosecution of the criminal case which was not presented to the grand jury until more than sixteen months after the shooting, and the case was not tried until more than twenty-eight months after the shooting. It would appear that Rose was using the threat of criminal prosecution over petitioner in an effort to force petitioner to pay him civil damages.

The opinion of the Court of Criminal Appeals of Tennessee, which is the only written opinion in the case, makes a grievous error in its statement on page 1 thereof (R-26), as follows:

> "An accused cannot claim that he has been denied the right to a speedy trial when he acquiesced in or requested the delay. Citing cases."

It is respectfully submitted that the learned Court of Criminal Appeals for Tennessee did not comprehend the gravamen of petitioner's appeal. It appears in the record that on one occasion, *after indictment*, the case was passed on motion of counsel for petitioner, but on all other occasions it was passed on application of the State of Tennessee. The passing of the case, *after indictment*, is not the gravamen of the complaint raised herein by petitioner. The error raised by petitioner is that he was denied his right to a speedy trial by reason of the failure of the State to indict him from the date of his arrest on November 14, 1964 until March 25, 1966.

It will be noted, too, that in the opinion of the Court of Criminal Appeals of Tennessee (R-27), the State would require the petitioner to make a request of the District Attorney that he be indicted, or that the matter in which he was involved be presented to the grand jury. The law imposes no such burden on a defendant. Furthermore, a prosecutor's responsibility to proceed without unnecessary delay begins not when the indictment is returned, but when the prosecution is begun [which in the instant case was at the time of arrest on November 14, 1964]. *Hanrahan* v. *U. S.*, (1965) 348 F.2d 363, 121 U.S. App. D.C. 134, on remand 255 F.Supp. 957.

QUESTION PRESENTED

Was petitioner denied the right to a speedy trial, and by reason thereof should the indictment have been dismissed?

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . ."

Fourteenth Amendment to the Constitution of the United States:

> "§1. * * * *Due process of law—Equal protection.* —* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 9, Constitution of Tennessee:

> *"Right of the accused in criminal prosecutions.*— That in all criminal prosecutions, the accused hath the right to . . ., in prosecutions by indictment or presentment, a speedy trial, . . ."

STATUTE INVOLVED

Tennessee Code Annotated:

> "*40-2001. Speedy trial—Right to be heard.*—In all criminal prosecutions, the accused is entitled to a speedy trial, . . ."

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Tennessee in this case is in direct conflict with decisions of this Court.

The question presented is of major importance and significance to the administration of justice, so as not to have federal decisions and State decisions in conflict with respect to constitutional rights.

The Supreme Court of Tennessee is bound under the federal Constitution to follow decisions of this Court, and in this case, it flagrantly ignored the decisions of this Court. Under the Fourteenth Amendment the States are held to the same standards required under the Sixth Amendment. *Mapp* v. *Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; *Gideon* v. *Wainwright,* 372 U.S. 335, 83 S.Ct. 792; *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758; *Pointer* v. *State of Texas,* 380 U.S. 400, 85 S.Ct. 1065; *Miranda* v. *State of Arizona,* 86 S.Ct. 1602.

The most exhaustive decision we have found on the right to a speedy trial is that of *Petition of Provoo,* D.C. Md. 1955, 17 F.R.D. 183, affirmed 76 S.Ct. 101, 350 U.S. 857, 100 L.Ed. 761.

Under the facts of the instant case there is no doubt that petitioner was denied his right to a speedy trial guaranteed him under the Sixth Amendment to the Constitu-

tion of the United States, Article 1, Section 9, Constitution of Tennessee, and §40-2001, Tennessee Code Annotated.

It is not the duty of an accused to press that he be prosecuted upon indictment under penalty of waiving his right to a speedy trial for such failure. *U. S.* v. *Dillon,* (D.C., N.Y., 1960) 183 F.Supp. 541.

The mere lack of a speedy trial in and of itself is not sufficient to reverse a conviction. There must be a substantial prejudice effected by the delay. *Petition of Provoo, supra.*

In the instant case petitioner was substantially prejudiced, in that witnesses disappeared and could not be located; the witnesses who were located were indefinite as to important details; the pistol, which was the most important single piece of evidence in the case, had disappeared and could not be produced by the State, and the production of the pistol would have substantiated petitioner's plea of self-defense and the further plea that he was acting in the defense of another whose life was being threatened by the person who was shot. Certainly, the defense of lack of a speedy trial was providently raised, because it was immediately made before the jury was impaneled and at the very commencement of the trial (R-19-R-23).

The defense of lack of a speedy trial is of no effect where a defendant causes the delay; but there is no showing in the instant case that petitioner did anything to delay presentment of this case to the grand jury. Furthermore, there is no showing in the record that the State gave any reason for the delay in presenting this case to the grand jury.

This Court has held that factors to be considered in determining whether a defendant has been deprived of his right to a speedy trial are: length of delay, reasons for delay, prejudice to the defendant, and waiver by the defendant. *Buatte* v. *U. S.*, (C.A., Ariz., 1965) 350 F.2d 389, cert. denied 385 U.S. 856, 87 S.Ct. 104, 17 L.Ed.2d 83.

In the instant case, there was an inordinate delay in presenting the case to the grand jury; the State gave no reason for the delay; the delay prejudiced the petitioner, as heretofore shown; and there is nothing in the record that petitioner waived his right to a speedy trial.

The right to a speedy trial is grounded in *Magna Carta*, wherein it is provided:

> "To no one will we sell, to no one deny or delay, right or justice." See *Petition of Provoo, supra.*

RELIEF

For the foregoing reasons, and under the decisions of this Honorable Court, the petition for writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER TERM, 1968

J. B. KING,
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vs.

STATE OF TENNESSEE,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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IN THE

COURT OF CRIMINAL APPEALS OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

APRIL 1968

APPEAL IN ERROR FROM THE CRIMINAL COURT OF KNOX COUNTY
HONORABLE JOE D. DUNCAN, JUDGE

J. P. KING,
Plaintiff in Error,
v.
STATE OF TENNESSEE,
Defendant in Error.

Knox Criminal

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JUDGMENT AFFIRMED
OPINION BY JUDGE MARK A. WALKER

(Filed September 4, 1968. John A. Parker, Clerk)

Opinion

The defendant below, J. B. King, was convicted in Knox County Criminal Court of assault with intent to commit murder in the second degree and sentenced to one to five years in the penitentiary. His motion for a new trial being overruled, he has appealed to this court, assigning as error that:

(1) He was denied his right to a speedy trial as guaranteed by the state and federal constitutions; and

(2) There is no evidence to support the verdict.

The defendant was arrested at about 10:00 P.M., November 14, 1964, for shooting one Glenn Rose. On March 25, 1966, he was indicted for assault with intent to commit murder in the first degree. His trial was held on March 20 and 21, 1967.

When the case was called for trial on March 20, 1967, the defendant, through his counsel, moved to dismiss the case because he had not had a speedy trial as guaranteed by the state and federal constitutions. This was the first objection to the delay of the defendant's trial. At least one continuance was on the defendant's application.

An accused cannot claim that he has been denied the right to a speedy trial when he acquiesced in or requested the delay. See *Raine* v. *State,* 143 Tenn. 168, 226 S.W. 189; *State ex rel. Underwood* v. *Brown,* 193 Tenn. 113, 244 S.W.2d 168; *Wright* v. *State,* ..... Tenn. ....., 405 S.W.2d 177.

The guaranty of the Sixth Amendment to the United States Constitution is made applicable to the states through the Fourteenth Amendment. *Klopfer* v. *North Carolina*, 386 U.S. 213, 18 L.Ed.2d 1, 87 S.Ct. 988 (1967).

The defendant relies on *Hanrahan* v. *U. S.*, 348 F.2d 363 (1965). In that case, the appellant was convicted five years after he was accused and almost four years after he was first charged with the offense; he made repeated and persistent attempts to obtain a speedy trial; the case was remanded to determine whether or not any of his rights were violated under the federal constitution or the Federal Rules of Criminal Procedure.

In the case before us, the defendant made no objection until the day of the trial. Rose was in the hospital for thirty-one days after the shooting and returned there several times before the indictment. While the indictment was not returned until about sixteen months after his arrest, the defendant requested a continuance and acquiesced in the delay after indictment. 5 Wharton's Criminal Law and Procedure, Sec. 1912.1, (1968 Supplement) says:

> "(I)t is generally held that the defendant is not entitled to a discharge for delay in bringing him to trial unless he resisted postponement, demanded a trial, or made some effort to procure a speedier trial than the state accorded him."

Neither the constitutional inhibition against delay, Article 1, Section 9, Constitution of the State of Tennessee, nor the Sixth Amendment of the United States Constitution was violated under the facts of this case. This assignment is overruled.

Glenn Rose operated a beer tavern on Chapman Highway in Knox County. The defendant and several friends

had been there for beer before and after a football game. On the second occasion, Claude Luttrell, one of the defendant's party, and two patrons were involved in an argument, during which another of defendant's friends (Bob Moore) intervened. Mr. Rose ordered the participants in the argument to leave. The defendant left with his friends, although he was not requested to leave. Moore, Luttrell and the defendant returned in about twenty minutes. They resumed arguing and were again told to leave. They did so after purchasing a package of beer. The defendant and Moore threatened to return as they left.

At about 9:40 P.M. the defendant and his two friends returned. The defendant and Luttrell sat at stools at opposite ends of the bar. Moore remained in the center of the tavern floor. The State's proof shows that Moore had a knife; this is disputed by the defense.

Rose came from behind the counter with a nightstick and struck Moore on the head and held him. The knife fell to the floor and under a record player. The defendant jumped from his stool and shot Rose in the stomach with a .22 caliber pistol which he had bought from Rose that morning. Rose places the distance between them at twenty feet, another witness at ten to fifteen feet and the defendant at six feet.

From the evidence in this case, it was the province of the jury to settle the issue of self-defense. The jury saw and heard the witnesses and passed upon their credibility. The jury decided the issue in favor of the State's theory, and this court cannot say that the evidence preponderates against that finding. *Arterburn* v. *State,* 216 Tenn. 240, 391 S.W.2d 648; *May* v. *State,* ..... Tenn. ....., 420 S.W.2d 647.

The defendant has not carried the burden of showing that the evidence preponderates against the verdict of guilty and in favor of his innocence, which he is required to do on appeal. *McBee* v. *State*, 213 Tenn. 15, 372 S.W.2d 173; *Pryor* v. *State*, 217 Tenn. 695, 400 S.W.2d 700.

It therefore follows that the assignments of error are overruled and the judgment of the trial court is affirmed.

/s/ Mark A. Walker
Presiding Judge

CONCUR:

/s/ W. Wayne Oliver
/s/ Fred D. Gilliam

OFFICE OF CLERK OF COURT OF CRIMINAL APPEALS FOR THE EASTERN DIVISION OF THE STATE OF TENNESSEE

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Opinion of said Court, pronounced at its June term, 1968, in the case of J. B. KING against STATE OF TENNESSEE as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 7th day of January, 1969.

/s/ John A. Parker
Clerk

(Seal)

COURT OF CRIMINAL APPEALS OF TENNESSEE,
AT KNOXVILLE

JUNE TERM 1968

J. B. KING vs. STATE OF TENNESSEE	**No. 4 Knox County** Offense Assault with intent to commit murder in second degree AFFIRMED

Judgment

(Filed September 4, 1968, John A. Parker, Clerk)

Came the plaintiff in error J. B. King by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the plaintiff in error, for his offense of assault with intent to commit murder in second degree be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more than five (5) years, and not less than one (1) year, commencing on the day of his reception at said penitentiary.

The sentence of imprisonment will be credited with the time the plaintiff in error spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

The plaintiff in error will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Knox County, which will be his authority for delivering the plaintiff in error to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

In the event the plaintiff in error files a petition for certiorari in the Tennessee Supreme Court, he may be admitted to bail on bond in the penalty of $2,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for his appearance in the Supreme Court; and in default of such bond he will be remanded to the Sheriff of Knox County.

Mark A. Walker
Fred Gilliam
W. Wayne Oliver

OFFICE OF CLERK OF COURT OF CRIMINAL APPEALS FOR THE EASTERN DIVISION OF THE STATE OF TENNESSEE

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Judgment of said Court, pronounced at its June term, 1968, in the case of J. B. KING against STATE

OF TENNESSEE as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 7th day of January, 1969.

/s/ John A. Parker
Clerk

(Seal)

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

SEPTEMBER TERM 1968

(Filed Oct. 7, 1968. John A. Parker, Clerk)

J. B. King
Vs.
State of Tennessee

Knox Criminal Court

WRIT DENIED

This case coming on to be heard upon a transcript of the record from the Criminal Court of Knox County, opinion and decree of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

The petitioner J. B. King will pay the costs incident to filing petition for certiorari, for which let execution issue.

Hamilton S. Burnett, C. J.
Ross W. Dyer, J.
Larry Creson, J.
Chester C. Chattin, J.
Allison B. Humphreys, Jr., J.

OFFICE OF CLERK OF SUPREME COURT
FOR THE EASTERN DIVISION OF THE
STATE OF TENNESSEE

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Order of said Court, pronounced at its September term, 1968, in the case of J. B. KING against STATE OF TENNESSEE as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 7th day of January, 1969.

/s/ John A. Parker
Clerk

(Seal)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 890.

J. B. KING,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 890.

J. B. KING,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

OPINION BELOW.

The opinion of the Court of Criminal Appeals of Tennessee was entered and filed on September 4, 1968, and has been published at 432 S. W. 2d 490. The Supreme Court of Tennessee denied certiorari on October 7, 1968, in an Order which can be found on page A-8 of the Appendix of the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition. However, the respondent directs attention to the fact that the Petition seeks a writ of certiorari

directed to the Supreme Court of Tennessee while this cause remains in the Court of Criminal Appeals of Tennessee, as the Supreme Court of Tennessee refused to issue a writ of certiorari to the Court of Criminal Appeals of Tennessee. Therefore, the respondent respectfully submits that the Petition seeks the writ of certiorari directed to the improper Court.

QUESTION PRESENTED.

The respondent is dissatisfied with the presentation of the question by the Petition and, pursuant to **Rule 40 (3)** of the Supreme Court Rules, presents the question as follows:

> Did the Petitioner, by consenting to and obtaining continuances of his case after the indictment had been returned, waive his right to a speedy trial by failing to promptly assert this personal right?

STATUTE INVOLVED.

Section 40-2102 of **Tennessee Code Annotated** provides:

> "If a defendant charged with an offense be not indicted at the term to which he has been bound, or, where the trial has not been postponed on his application, be not brought to trial at the next regular term of the court in which the indictment is triable, after the same is found, the court may order it to be dismissed, unless good cause to the contrary be shown."

STATEMENT OF THE CASE.

The Petitioner was convicted by a jury in the Criminal Court of Knox County, Tennessee, of the crime of assault with intent to commit murder in the second degree. The Petitioner was sentenced to serve a term of not less than one (1) year, nor more than five (5) years, in the State Penitentiary. The Petitioner was represented by privately retained counsel at his original trial, and has been out on bond since his arrest.

The evidence establishing the Petitioner's guilt is adequately set forth in the opinion of the Criminal Court of Appeals of Tennessee and counsel for the respondent respectfully submits that any further summary of this evidence would be needless repetition. However, the opinion of the Court of Criminal Appeals of Tennessee and the Petition filed herein fail to mention several matters shown by the record which are crucial to a proper consideration of the question before this Court.

Initially, it must be noted that the Petitioner's motion to the Trial Court, which was never formally presented in writing and was made orally on the day of the trial, only mentioned the absence of some unnamed witnesses as being the prejudice resulting from the delay in this case. However, it must also be noted that the Petitioner, in his statement of the motion to the Trial Court, admitted that these unnamed witnesses had been available a year ago. In addition, the Petitioner has never shown any evidence of any attempt at any time to secure the attendance of these unnamed witnesses.

The Petitioner was arrested for this crime on November 14, 1964. He was charged with assault with intent to commit murder in the first degree in an indictment returned by the Knox County Grand Jury on March 25, 1966. After at least three continuances, the Petitioner's

trial was held on March 20 and 21, 1967. The record reflects that the Petitioner requested the first continuance after the indictment had been returned, which was about a year before the trial, and failed to interpose any objection to subsequent continuances granted in this case. The record also reflects that some of the delay in this case was caused by the fact that the person assaulted by the Petitioner had to be hospitalized several times as a result of the assault which made it impossible for him to appear before the Knox County Grand Jury and accounted for one of the continuances after the indictment had been returned.

ARGUMENT.

There can be little doubt that the accused's right to a speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States is made obligatory on the several states by the Fourteenth Amendment. **Klopfer v. North Carolina,** 386 U. S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988. This Court's views on the Sixth Amendment guarantee of a speedy trial are most succinctly summarized in the following excerpt from **United States v. Ewell,** 383 U. S. 116, 120, 15 L. Ed. 2d 627, 630, 86 S. Ct. 773, 776:

> "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. However, in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. Therefore, this Court has consistently been of the view that 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.' Beavers v. Haubert, 198 U. S. 77, 87, 49 L. Ed. 950, 954, 25 S. Ct. 573, 576. 'Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances. . . . The delay must not be purposeful or oppressive,' Pollard v. United States, 352 U. S. 354, 361, 1 L. Ed. 2d 393, 399, 77 S. Ct. 481, 486. '(T)he essential ingredient is

orderly expedition and not mere speed.' Smith v. United States, 360 U. S. 1, 10, 3 L. Ed. 2d 1041, 1048, 79 S. Ct. 991, 997."

As in Tennessee, **Raine v. State,** 143 Tenn. 168, 226 S. W. 189, and **Wright v. State,** 218 Tenn. 610, 405 S. W. 2d 177, the Federal decisions clearly establish that the right to a speedy trial is the defendant's personal right and is deemed waived if not promptly asserted. **United States v. Lustman,** 258 F. 2d 475, 478 (2d Cir. 1958), **cert. denied** 358 U. S. 880, 3 L. Ed. 2d 109, 79 S. Ct. 118; **United States v. Aadal,** 368 F. 2d 962 (2d Cir. 1966), **cert. denied** 386 U. S. 970, 18 L. Ed. 2d 130, 87 S. Ct. 1161; **United States v. Van Allen,** 288 F. 2d 825 (2d Cir. 1961), cert. denied 368 U. S. 836, 7 L. Ed. 2d 37, 82 S. Ct. 31; **Danziger v. United States,** 161 F. 2d 299 (9th Cir. 1947), **cert. denied** 332 U. S. 769, 92 L. Ed. 354, 68 S. Ct. 81; **Campodonico v. United States,** 222 F. 2d 310 (9th Cir. 1955), **cert. denied** 350 U. S. 831, 100 L. Ed. 2d 742, 76 S. Ct. 65. Also, as in Tennessee, the Federal decisions clearly establish that where some or all of the delays were at the defendant's request or by his own action, the defendant will be precluded from invoking his constitutional right to a speedy trial. **Osborne v. United States,** 371 F. 2d 913 (9th Cir. 1967), **cert. denied** 387 U. S. 946, 18 L. Ed. 2d 1335, 87 S. Ct. 2082; **United States ex rel. Hanson v. Ragen,** 166 F. 2d 608 (7th Cir. 1948), **cert. denied** 334 U. S. 849, 92 L. Ed. 1772, 68 S. Ct. 1501; **United States v. Fassoulis,** 293 F. 2d 243 (2d Cir. 1961), **cert. denied** 368 U. S. 919, 7 L. Ed. 2d 134, 82 S. Ct. 240.

These Federal and Tennessee decisions clearly establish that the right to a speedy trial is indeed not designed as a sword to effect the defendant's escape, but rather to serve as a shield for the accused's protection. Note, **The Right to a Speedy Criminal Trial,** 57 Col. L. Rev. 846, 853 (1957). In the case herein under consideration, the

Petitioner is attempting to carve out his freedom, after havinge acquiesced in the delay of his trial for almost one year, on the basis of an oral motion on the day of trial suggesting the absence of some unnamed witnesses whom he had not seen fit to subpoena.

CONCLUSION.

As the Petition presents no question which merits this Court's review upon a writ of certiorari, the respondent respectfully submits that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee,

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LANCE D. EVANS,
Assistant Attorney General,
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Attorneys for Respondent.

Certificate of Service.

I, Thomas E. Fox, Deputy Attorney General of the State of Tennessee, one of the attorneys for the respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of January, 1969, I served a copy of the within Brief in Opposition to the Petition for Writ of Certiorari on J. B. King, Petitioner, by mailing said copy in a duly ad-

dressed envelope, postage duly paid, to counsel of record, William E. Badgett, Esquire, Attorney at Law, 608 Bank of Knoxville Building, Knoxville, Tennessee 37902.

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Thomas E. Fox,
Deputy Attorney General,
State of Tennessee.